

Pandemic Response as Accentuation of Existing Characteristics: Vague Requirements and Executive Dominance in Ireland

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1. A Year in Review

In Ireland, it is not constitutionally permissible to declare an emergency in response to COVID-19. The legal response, therefore, has been mounted within the normal constitutional framework. This has consisted of five primary statutes that (a) empower the Minister for Health to make regulations (secondary legislation) imposing restrictions to control the pandemic and (b) establish enforcement powers that the Minister for Health can attach to particular restrictions. By early March 2021, the Minister had made 74 sets of regulations imposing restrictions.

The restrictions are broadly comparable to those adopted in other countries. They seek to reduce interpersonal contact by [closing businesses](#), restricting events (including household gatherings), and during the most extreme lockdowns of April-May 2020 and January-March 2021 prohibiting people from [leaving their homes](#) without reasonable excuse. Reasonable excuses included exercising within 5km of one's home, and doing essential work. Requirements to wear face coverings in indoor public places and on public transport were introduced. Initially [minimal](#) obligations were imposed on international passengers arriving in the State, but these were [extended](#) in January-March 2021 to include compulsory home quarantine as well as requirements for PCR tests. The Oireachtas (Parliament) has just [legislated](#) to require hotel quarantine for passengers arriving from some countries, although this has not been implemented yet.

The range of enforcement powers has increased over the course of the pandemic. They include [criminal offences](#) and the related power of the police to [direct](#) people to comply with restrictions, [on-the-spot fines](#) for breaching restrictions, powers to break up [household gatherings](#) (but without entering the dwelling), and powers to close pubs that breach restrictions.

The pandemic struck after the 2020 General Election but before a new Government had been formed. The outgoing Government [secured](#) the enactment of two statutes with the support of Opposition parties in March 2020. Between March and June 2020, there was a high degree of political consensus in how to respond to the pandemic. At the end of June 2020, a new Government was [formed](#). Over the summer, political consensus began to break down, an inflection point being when '[Golfgate](#)' led to the resignation of several [politicians](#), one [European Commissioner](#),

but not a [Supreme Court judge](#), after they attended an event that breached recently announced public health guidelines and the organisation of which was [arguably in breach](#) of the existing law. In Autumn 2020, the Government came under increasing political pressure for imposing restrictions that were [too strict](#). The spike in cases over Christmas 2020 appears to have settled the political argument in favour of strict regulations, if not the desirability of adopting a [zero-COVID approach](#).

2. The Executive and Use of Powers in Response to Emergency

As noted above, while no state of emergency has been declared, the Oireachtas has delegated broad power to the Minister for Health to make regulations responding to the pandemic. The Constitution had previously been [interpreted](#) by the courts to allow the Oireachtas to delegate legislative power in this way, provided that the primary legislation provides for principles and policies. In my view, the delegation of legislative power—while extensive—remains within the scope of what is constitutionally permissible. The Government, which holds a majority in parliament, has secured the passage of primary legislation for all enforcement powers. This suggests that the norms on what is appropriate for primary and secondary legislation are holding. It therefore seems unlikely that future Governments would seek to build on the COVID-19 precedent as a pretext for increased executive powers.

3. The Effectiveness of Judicial and Legislative Scrutiny and Oversight

Legislative scrutiny of the COVID-19 response has been lacking. During the [debates](#) on primary legislation, members of the Dáil (lower House) actively participated and raised concerns, particularly around enforcement powers. Their main success was to ensure that the powers in the legislation would [lapse](#) in November 2020 if not re-authorised. However, that reauthorisation occurred with little difficulty and with little consideration being given to the appropriate period for the next extension. All powers have now been extended until June 2021.

Members of the Dáil were hampered in their ability to assess the delegation of legislative power, however, since it was unclear how the delegated legislative power would be exercised. Other mechanisms through which scrutiny could be exercised have not been used. Although regulations made by the Minister must be laid before each House of the Oireachtas and can be [overturned](#), this has not occurred. Only [one](#) of the over 70 sets of regulations has been subject to debate in this way, to little effect.

This lack of legislative scrutiny is particularly problematic given that there is no structured analysis of human rights and equality implications when the Regulations are being made. The National Public Health Emergency Team, which has no expertise in human rights and equality, makes recommendations to the Government about how to respond to the pandemic. These recommendations are first considered

by a Cabinet sub-committee and then by the full Cabinet. The Government is, of course, legally free to accept or reject these recommendations, although it can be politically difficult not to accept a recommendation even if the Government were minded to do so. Typically, there is very little time between the recommendations and the Government decision.

Judicial scrutiny of pandemic measures has occurred. In May 2020, the High Court [rejected](#) a general challenge to the way in which the COVID restrictions had been introduced. This challenge, mounted by fringe political figures was misconceived; it is unsurprising that it was rejected. In October 2020, the High Court [rejected](#) a challenge by Ryanair to Government advice that international passengers arriving in the State should restrict their movements for two weeks. While the Government had blurred the status of this advice—frequently describing it in mandatory terms more appropriate for legal obligations—the Court concluded that it was merely advice and within the scope of the executive power. At present, there is a [challenge](#) pending before the courts to restrictions on religious services. This is again unlikely to succeed as religious services, with the exception of funerals, are [not legally restricted](#). Rather, the various religious organisations have decided to follow public health advice not to hold such services.

4. Federal, Regional and Local Response and Coordination

Ireland is a unitary, highly centralised state so these issues do not arise internally. However, the open border with Northern Ireland has proved an impediment to managing the pandemic. The restrictions in the regulations did not apply to those who live in Northern Ireland and there was no restriction on people from Northern Ireland crossing the border. This became politically controversial in summer 2020 when cases were close to zero in the Republic of Ireland but materially higher in Northern Ireland and more recently when the emergence of worrying variants in other parts of the world returned the focus to the feasibility of quarantining international travellers. In late January 2021, changes were [made](#) to the Regulations to ensure that the movement restrictions apply to people from Northern Ireland who enter the State.

5. Human Rights and Civil Liberties Considerations

The principal restrictions on liberty introduced to address the pandemic—restrictions on movement, businesses, events, and household gatherings—are justified as a proportionate measure adopted for the common good and/or to protect rights to health and life. Nevertheless, these measures impact particularly harshly on already disadvantaged groups that are protected under national and international human rights laws. All children but especially [those](#) with special needs have particularly suffered from interruption to education; carers, disproportionately [women](#) and mothers, have carried increased burdens; [socioeconomic disadvantage](#), particularly as manifest in the digital divide, has meant that restrictions have a disparate impact.

Particular concerns arise from the failure of the police service to maintain disaggregated data showing how enforcement powers have been exercised against groups protected under national and international equality and human rights laws. Anecdotal evidence and prior experience would suggest that disproportionate exercise of enforcement powers against ethnic minorities, including members of the Travelling community, and younger people is likely. The failure to record disaggregated data both prevents a proper assessment of this issue and is itself a [breach](#) of international human rights standards.

Serious concerns also arise in relation to the rule of law. The Regulations have been introduced with little notice and frequently are [not published](#) until several days after they come into force. Statute [ensures](#) that criminal liability cannot be imposed in these circumstances, but late publication remains problematic because sometimes the effect of a regulation can be to remove a criminal sanction. Most of the restrictions imposed are subject to 'reasonable excuse' exceptions. For example, at the time of writing, it is a criminal offence to leave one's house without reasonable excuse. There is a long list of specified reasonable excuses, but also a residual category of [reasonable excuse](#). It is very difficult to know what this consists of. Most problematically, the Government persistently [blurs](#) the distinction between legal restrictions and public health advice, presenting advice in mandatory terms. For instance, the Department of Foreign Affairs website at one point stated that 'the Irish Authorities' *required* international passengers to restrict their movements for 14 days even though this was only advice.

6. 2021 Outlook

It is a reasonable hypothesis that states' responses to the pandemic have brought into sharp relief the core strengths and weaknesses of their constitutional systems. Ireland generally fares well in global rankings of democracy and civil rights; there is little to suggest that the response to the pandemic presages any form of democratic backsliding or general regression in the rule of law. Nevertheless, the extent of executive domination of parliament has always been a concern. Legislators have never had meaningful oversight of or input into secondary legislation, but this is particularly problematic during the pandemic where the regulations make such sweeping restrictions to personal freedoms.

The Irish Human Rights and Equality Commission, in a [report](#) which I co-authored, has made many recommendations to improve governance, democracy and the rule of law. The following are the most important:

- The establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity, to review all primary legislation adopted as part of the COVID-19 response and exercise an oversight function in relation to all secondary legislation.
- All statutes adopted as part of the COVID-19 response should be subject to sunset clauses that allow for time-limited extensions of three months, by resolution of both Houses of the Oireachtas.

- The Minister for Health should publish a human rights and equality analysis of the proportionality of each set of regulations within 48 hours of their being made.
 - Section 31A of the Health Act 1947 should be amended to provide that all regulations made by the Minister for Health will lapse within 10 sitting days if not positively endorsed by a resolution of each House of the Oireachtas.
 - All regulations should be published at least 48 hours prior to coming into force, unless there is an urgent public health reason not to do so.
 - The Government should at all times and in all communications maintain a clear distinction between measures that are legally obligatory and public health advice. In particular, the Government should not present public health advice as if it were criminally enforceable.
 - Regulations should not make criminal liability subject to a general 'reasonable excuse' provision but should instead have a general exception for 'urgent and compelling reasons'.
 - The police service should take steps to ensure that disaggregated data is retained on the exercise of all enforcement powers.
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